

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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MICHAEL WATSON,

96 CV 3679

Petitioner,

MEMORANDUM

AND

ORDER

-against-

ERNEST EDWARDS, Superintendent,  
Otisville Correctional Facility

Respondent.

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MICHAEL WATSON  
No. 91-A-9102  
Orleans Correctional Facility  
35-31 Gaines Basin Road  
Albion, New York 14411-9199  
petitioner pro se.

CHARLES J. HYNES, District Attorney, Kings County  
(Roseann B. MacKechnie, Andrea G. Klineman, James  
C. Jenkins, of counsel)  
Municipal Building  
210 Joralemon Street  
Brooklyn, New York 11201  
for respondent.

NICKERSON, District Judge:

Petitioner pro se brought this proceeding for a  
writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Respondent moves to dismiss the petition as untimely, and without merit.

I

After a trial in the Supreme Court, Kings County, a jury found petitioner guilty of assault in the second degree, reckless endangerment in the first degree, and criminal possession of a weapon in the second degree. On November 26, 1991 the court sentenced petitioner as a predicate felony offender to seven and one-half to fifteen years imprisonment for the weapon possession, to run concurrently with consecutive terms of three and one-half to seven years for the assault and reckless endangerment convictions.

Petitioner appealed his conviction, arguing that the court improperly admitted evidence of his lineup, and that comments made by the prosecutor during summation denied him a fair trial. The Appellate Division affirmed the conviction on January 18, 1994. People v. Watson, 200 A.D.2d 643, 606 N.Y.S.2d 739 (2d Dep't 1994). On March 16, 1994 the New York Court of

Appeals denied petitioner's application for leave to appeal. People v. Watson, 634 N.E.2d 992, 83 N.Y.2d 859, 613 N.Y.S.2d 391 (N.Y. 1994). This petition followed.

## II

Respondent first seeks to have the petition dismissed as untimely under 28 U.S.C. § 2244(d)(1)(A). The Antiterrorism and Effective Death Penalty Act (the Act), Pub. L. No. 104-132, 110 Stat. 1214 (1996), amended 28 U.S.C. § 2244 to require that a habeas petition be filed no later than one year after the date on which a judgment of conviction becomes final. See 28 U.S.C. § 2244(d)(1)(A). The Act became effective on April 24, 1996. But a petitioner has a grace period of one year from the effective date of the Act to file a petition under 28 U.S.C. § 2254. See Ross v. Artuz, 1998 WL 400446, \*7 (2d Cir. 1998). Petitioner filed his petition on July 24, 1996, three months after the effective date of the Act. The petition is timely.

Petitioner raises one claim in his petition, that

the state court improperly admitted evidence of his lineup at trial.

On October 6, 1990 Detective Hall arrested petitioner without a warrant for shooting and physically injuring Dwayne Haywood, Tanesha Washington, Jasinta Allen, and Nathan Plant. Detective Hall brought petitioner to the 73<sup>rd</sup> Precinct stationhouse, where he put together a photo array, which included a picture of petitioner and other filler photographs. The detective obtained the photograph of petitioner from the 83<sup>rd</sup> Precinct stationhouse, where it was on file from a previous arrest. Three eyewitnesses identified petitioner as the shooter. Following the photo-array identifications, and approximately seven hours after the arrest, Detective Hall put together a lineup in which six of the seven witnesses identified petitioner as the shooter.

After a hearing to suppress the lineup evidence, the court concluded that Detective Hall arrested petitioner without probable cause, but found that the

evidence obtained after the illegal arrest was sufficiently attenuated, and could therefore be introduced at trial. Specifically, the court found that (1) the seven hours between the arrest and the lineup dispelled any taint, (2) the identification of petitioner by three witnesses from the photo array served as an intervening factor, and (3) Detective Hall acted in good faith.

Section 2254 of the Act provides that a state prisoner's application for a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless that adjudication (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States," or (2) was "based on an unreasonable determination of the facts in light of the evidence presented at the State Court proceedings." 28 U.S.C. § 2254(d)(1), (2).

Evidence derivative of a constitutional violation

must be suppressed as the fruit of a poisonous tree, unless the taint of the constitutional violation has dissipated. See Wong Sun v. United States, 371 U.S. 471 (1963). To determine whether the taint of a constitutional violation is sufficiently attenuated, a court must consider (1) the temporal proximity of the illegal conduct, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. See Brown v. Illinois, 422 U.S. 590, 603-604 (1975).

In affirming, the Appellate Division held that Detective Hall arrested petitioner without probable cause but that the lineup identifications, approximately seven hours after his arrest, were sufficiently attenuated. This did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court. Nor is the decision based on an unreasonable determination of the facts in light of the evidence presented in the

state court. Petitioner's claim is without merit.

Additionally, petitioner raises in his traverse to the government's affidavit in opposition to the petition the claim that remarks made by the prosecution during summation denied him a fair trial. He argues that the prosecutor vouched for the credibility of government witnesses, impugned defense counsel's credibility, and argued facts not in evidence.

The Appellate Division considered this claim and held that it was either unpreserved or without merit. In any event, the Appellate Division found that given the overwhelming evidence of petitioner's guilt, any error would have been harmless.

The petition is denied. A certificate of appealability will not be issued because petitioner has not made a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253; Reyes v. Keane, 90 F.3d 676, 680 (2d Cir. 1996).

So ordered.

Dated: Brooklyn, New York  
August 4, 1998

Eugene H. Nickerson  
Eugene H. Nickerson, U.S.D.J.